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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 124

LONNIE AVERY,

Petitioner,

vs.

STATE OF ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

REPLY BRIEF OF PETITIONER

L. S. MOORE,
JOHN A. FOSHEE,
Counsel for Petitioner.

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REPLY BRIEF OF PETITIONER

The Attorney General of Alabama in his brief, filed in this cause in behalf of the State of Alabama, has cited and made reference to numerous decisions of the Supreme Court of the various States discussing the question raised by the denial of a motion for a continuance of a criminal case under the constitution and laws of that State.

The reference that we have made to the decisions of State courts in our original brief, heretofore filed in this cause, makes it clear that the State courts are not altogether in accord upon the subject, even under their laws.

It is our idea that decision of State courts construing State law and State constitutional law are not controlling upon this Honorable Court in its application of the facts in this case to the due process of law clause of the 14th

Amendment to the Constitution of the United States of America. In the case of *Powell* v. *State of Alabama*, 84 A. L. R. 527, 287 U. S. 45, this Court reversed the case although the Supreme Court of Alabama had held that its Constitution and laws had not been contravened.

In the case of *Herbert* v. *Louisiana*, 71 L. Ed. 270, decided in 1926, this Court said:

> "Whether a State Statute shall be construed one way or another is a State question, the final decision of which rest with the courts of the State. The due process of law clause of the 14th Amendment does not take up the statutes of the several States and make them the tests of what it requires; nor does it enable this Court to revise the decisions of State courts on questions of State law.
>
> What it does require is that the State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

After making certain other assertions the court continued:

> "Those principles are applicable alike to all the States and do not depend upon or vary with local legislation."

State decision, however, applying the laws of that State, may throw some light upon the rule that a reasonable time must be allowed counsel appointed to defend a case of this nature in which to prepare for trial. That rule is gathered from the expressions of the *Powell* case, *supra*, when it said:

> "That duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

The Federal courts have applied the above rule in decisions rendered since the *Powell* case, *supra*, in the case of

Jones v. *Commonwealth of Kentucky*, Circuit Court of Appeals, Sixth Circuit, decided June 8, 1938, 97 F. (2d) 335. In that case Jones was convicted of murder in the Kentucky courts and sentenced to death. He exhausted all right of appeal in the State courts and then challenged by petition for writ of habeas corpus, filed in United States District Court, the manner of his conviction as an impairment of the due process clause of the 14th Amendment in that he was denied the right of counsel with the accustomed incidents of consultation and time to prepare for trial. He was indicted on Nov. 4, for killing his wife; arraigned Nov. 8 and counsel appointed to defend him and trial set for Tuesday, Nov. 12; but was not reached until Thursday, Nov. 14. Motion for a continuance was denied by the State court. His trial began 10 days from the indictment and 6 days from the appointment of attorneys. There was an appeal from the Federal District Court. The Circuit Court of Appeals held:

> "It is true the trial court recognized its duty to assign counsel as a necessary requisite of due process of law, but, 'that duty is not discharged by an assignment at such time and under such circimstances as to preclude the giving of effective aid in the preparation and trial of the case.' Powell *v.* Alabama, 287 U. S. 45. It is likewise true that three days were available to counsel within which to make an investigation and prepare for trial. But when we take into consideration that this was a capital case, that the defendant was in jail and unable himself to give assistance, that the trial was to be held at a distance from the place where the crime was committed, and that counsel brought to the attention of the court by motion and supporting affidavit his inability to properly prepare for trial within the time, we think it must be concluded that the Constitutional right of the defendant to be heard by counsel as a necessary requisite of due process of law has not been preserved to him."

That case as to the facts is in all respects a parallel to the case at bar, except that in that case counsel did have three days that he was not engaged in court in which to prepare for trial.

There has been no contention made by the petitioner in this cause that he is entitled to an exact amount of time; that is to say one hour, one day, one week, or one month. The contention is, however, that attorneys appointed to defend such a case should be given a reasonable time in which to investigate and prepare for trial. And making up our mind as to that we should not become speculative and say as the Supreme Court of Alabama did in this case, the trouble is with a lack of material on which to base a defense rather then a mere matter of time. Compare the language of the *Powell* case, *supra*, with that.

We respectfully submit that this petitioner was denied, by the courts of Alabama, his constitutional right to be heard by counsel as a necessary requisite of due process of law.

Respectfully submitted,

L. S. Moore,
John A. Fosher,
Counsel for Petitioner.